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THE SUPREMACY OF LAW.

It is a weakness of the advocate that in his partisan zeal he is carried to extremes and often bases his case upon grounds which, to his own unbiased mind would seem "absurd and excessive extravagance."

Mr. George B. Gillespie, in his able argument for the exemption of a governor from arrest and criminal prosecution while in office, as published in the Central Law Journal for September 2, 1921, (Vol. 93, p. 149) illustrates this. He goes to the extreme of denying such fundamental American principles as the equality of men before the law, and the supremacy of the law itself. His arguments for the independence of the other departments of a government from interference by the courts, if pressed to their logical conclusion, would go to the extent of exempting any legislative or executive officer from legal proceedings while in office, since they might interfere with the performance of his official duties.

He contends that the governor alone is authorized to determine the scope of the powers of the executive and when they are immune from the judiciary. He inquires, "What right has the court, under a constitution, to construe the constitution for its governor and require him to accept its will?" He criticises the Wisconsin court for arrogating to itself the exclusive right to determine what are and what are not lawful duties of the governor under the constitution.

But as Chief Justice Marshall once said, "It is emphatically the province and duty of the judicial department to say what the law is. This is the very essence of judicial duty." It is well recognized in American constitutional law that there must be authority somewhere to determine whether the proper constitutional sphere of a department has been transcended, and thus prevent conflict. It is the power and duty of the courts to interpret the laws and the constitution, and so to define the scope of legislative and executive functions. (People v. Bissell, 19 Ill. 229). The oath of the governor to take care that the laws shall be faithfully executed and to uphold the constitution means the law and the constitution as interpreted by the courts. If officers depart from the powers which the law has vested in them, the courts no longer consider them as officers but treat them as individuals.

The equality of all persons before the law and the supremacy of law mean, as Dicey points out, (1) the absence of arbitrary power on the part of the executive, including the military arm over the citizen; (2) that every official, civil and military, is subject to the ordinary tribunals at all times for acts done in excess of his lawful authority; (3) that no one can plead the command of a superior in defense of conduct not apparently justified by law; (4) that executive authority is not above, but below, the law, and cannot set it aside. (Dicey, Law of the Constitution, [8th Ed.] pp. 183, 198, 282, 538). It is entirely possible to give full scope to the demands of public safety and necessity within the law without exalting executive and military officers above the law.

Mr. Gillespie makes a plausible argument in behalf of the wisdom and expediency of exempting the chief executive of the state or nation from interruption in his official duty by legal proceedings. It may well be that these arguments would be found persuasive by the courts and that such exemption might be allowed on grounds of public necessity and welfare in the conduct of government. But this is for the courts to determine.

Whether an English Colonial Governor can be tried on a criminal charge in his own colony does not seem to have been judicially determined, and the dicta are conflicting. (Ridges, English Constit. Law, [2nd. Ed.], 464).

In Musgrave v. Pulido, (Appeal Cases, Vol. 5, p. 103) (1879-80), which was an action of trespass brought against the governor of Jamaica for seizing a schooner, the defendant claimed immunity from liability to be sued in the courts of the Colony. The Privy Council refused to uphold this plea to the jurisdiction, and in the course of the opinion spoke as follows:

"The dictum attributed to Lord Mansfield in Fabrigas v. Mostyn, (1 Cowp. 161), that 'the Governor of a colony is in the nature of a Viceroy, and therefore locally, during his government, no civil or criminal action will lie against him; the reason is, because upon process he would be subject to imprisonment,' was dissented from and declared to be without legal foundation in the judgment of the Lords of the Judicial Committee delivered by Lord Brougham in the case of Hill v. Bigge, (3 Moore, P. C. 465). The action was for a private debt contracted by the defendant in England before he became Governor, but the principle affirmed by the judgment is that the Governor of a colony, under the commission usually issued by the Crown, cannot claim, as a personal privilege, exemption from being sued in the Courts of the colony. . . . . .

"Let it be granted that, for acts of power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of state. When questions of this kind arise it must necessarily be within the province of Municipal Courts to determine the true character of the acts done by a Governor, though it may be that, when it is established that the particular act in question is really an act of state policy done under the authority of the Crown, the defense is complete, and the Courts can take no further cognizance of it. It is unnecessary, on this demurrer, to consider how far a Governor, when acting within the limits of his authority, but mistakenly, is protected."

The great mistake of Governor Small has been his lawless attitude of threatening to use the power of his office to defy the courts and resist arrest. He was ill-advised by his counselors. Such questions as constitutional privilege from arrest cannot be decided by physical force, but only by reason and argument in the courts.

It is not the purpose of the writer to discuss this interesting question in detail, but reference should be made to one or two arguments advanced, which seem beside the point. The contention that the prosecution of a governor is futile because he would have the power immediately to pardon himself can hardly be taken seriously. The governor would, of course, be disqualified from acting as judge, or pardoner, in his own cause. This would seem to be an obvious implication.

The contention that the governor, as commander-in-chief of the militia, might exercise military force to resist arrest is equally specious. As the Kentucky Court of Appeals said in Franks v. Smith, (142 Ky. 232, 134 S. W. 484, L.R.A. 1915A, 1141), "To say that the state militia, acting in obedience to military orders, may commit any act that may suggest itself to the commanding officer as being necessary to restore peace and quiet, although such act might be a greater violation of the law than was committed by the person it was vested upon, would place the militia above the civil authority, and give to the soldier power not conferred upon the civil officer charged with the duty of enforcing the

law. . . . We can find no warrant, either in the Constitution or statute of the state or the history of Constitutional Government, for investing the military forces of the state with arbitrary power like this."

The contention that the militia would be bound to obey the illegal commands of the governor is also answered in this same case and in many cases collected in the note to it in L. R. A. 1915A, p. 1141. The great weight of authority is that persons engaged in the military service of the state or nation can find no justification or protection in orders which are illegal on their face or such as a man of ordinary sense and understanding would be justified in deeming illegal.

The court further says in Franks v. Smith, "As the chief civil magistrate of the state he calls out and must direct, in accordance with law, the movements and operations of the military forces. 'The military shall be at all times and in all cases in strict subordination to the civil power.' It is so written in Section 22 of the Bill of Rights. We have not and cannot have in this state a military force that is not and will not be subordinate to the civil authorities. . . . The soldier and the citizen stand alike under the law. Both must obey its commands and be obedient to its mandates."

The sheriff is not a military subordinate, under the orders of the governor, but an officer of the law, and as such armed with power and authority over the governor when the law gives it. It is not true that the acts of the governor as commander-in-chief of the militia cannot be questioned in any place or by any person, or that the courts have no power to determine when the governor is violating the law and the Constitution. The courts, it is true, have no supervisory control over the exercise by the governor of his power to *call out* the militia to suppress an insurrection, but they will not permit him to misuse the forces when called out, suspend the writ of habeas corpus or right of trial by jury, or establish extra-legal tribunals for the punishment of crime unknown to the Constitution. (Ex parte McDonald, 49 Mont. 454, 143 Pac. 947, L. R. A. 1915B, 988).

It is misleading to cite mandamus cases which hold that the courts will not interfere in the exercise of executive powers or control official actions and to pretend that they prove that the chief executive as an individual is above the restraining authority of the law.

HENRY W. BALLANTINE.

NOTES OF IMPORTANT DECISIONS

CONTRACTS IN RESTRAINT OF REMARMARRIAGE.—One chance at the matrimonial game is all that the law is willing to guarantee, on the theory, probably, that the first marriage is a necessity and the second a luxury. At any rate the law seems to be clear that while contracts in restraint of marriage are said to be void, the rule does not apply to remarriage, and that widows and widowers can be restrained from re-embarking on the sea of matrimony by jealous spouses or others who wish to attach such a condition to the bounties they distribute in their wills.

This rule is illustrated by the recent case of Stauffer v. Kessler, 130 N. E. 651, where the Appellate Court of Indiana held that a provision in a deceased wife's will, providing that a life estate given to her husband should terminate immediately upon his remarriage was valid. On this point the Court said:

"It is a well settled general rule of law that contracts in restraint of marriage, being against public policy, are void. Appellants concede that the said provision in the deed is a condition and not a limitation, nor do appellants controvert the general rule that contracts in restraint of marriage are void, but they insist that this general rule has no application to second marriage.

"Pomeroy in his excellent treatise on Equity Jurisprudence (2 Pom. Eq. Jur., 4th ed., Sec. 933), says:

" 'It seems to be settled by an overwhelming weight of authority that limitations and conditions, precedent or subsequent, tending to restrain the second marriage of women are valid, and by the most recent decisions the same rule has been applied to the second marriage of men.'

"The trend of judicial decisions, both in this country and in England, sustains Pomeroy's

statement (Bostick v. Blades, 59 Md., 231, 43 Am. Rep., 548; Appleby v. Appleby, 100 Minn., 408, 111 N. W., 305, 10 L. R. A. (N. S.), 590, 117 Am. St. Rep., 709, 10 Ann. Cas., 563; Allen v. Jackson, L. R., 1 Ch. Div., 399; Newton v. Marsden, 2 J. & H., 356). The reason given by the courts is that the rule as to first marriages has no substantial force when applied to second marriages; that a contract in restraint of a second marriage is a reasonable one the prevention of which is not a matter of public concern."

RECENT DECISIONS IN THE BRITISH COURTS.

The writer is not aware how far the principles of private international law obtain in the United States. His impression is that they are rather weakened by the fact that there is in the presence of the Supreme Court, an overhead authority which, to a certain extent, prevents each separate state developing a law of its own foreign to the general law of the union. The consequence of this is that in the state courts there may not be frequent occasions for the application of the principles of private international law.

We may here refer to the case of MacFarlane v. Macartney, 1921, W. N. 63. A testator, domiciled in England, left an illegitimate daughter, born after his death, in Malta, by a Maltese woman, to whom he was engaged. His assets comprised estates in both countries, though the executors proved the will in England. Four years later, at the suit of the mother, the Maltese Court of Appeal granted a posthumous affiliation order, which is unknown in England, and fixed an alimentary allowance.

The question was whether this judgment could be enforced in England. Counsel for the claimant contended that the declaration of paternity was a judgment *in rem*, carrying with it the necessary consequences of alimony, and that property moved from Malta to England could be followed.

Astbury, J., held the Maltese judgment unenforceable on three grounds: (1) the recognition of the right of an illegitimate child to permanent alimony was contrary to the policy of English law; (2) the judgment was founded on a cause of action unknown in England; (3) the judgment was only *in rem* as regards the declaration of paternity, but *qua* the assignment of alimony was *in personam* against the executors, and, therefore, could not be enforced as a debt against the assets in England.

One of the provisions of the Court's Emergency Powers Act passed under war conditions was to exempt army officers from bankruptcy proceedings. In re A Debtor, 37 T. L. R. 154, a receiving order was made by the Registrar against a demobilized officer. He had not been gazetted out of the service, nor had he received any notice of discharge. The construction of the Court's Emergency Powers Acts exempting officers from bankruptcy proceedings was not disputed. The question was whether the appellant debtor was an officer, and so protected, or not.

It was held that on demobilization an officer's position becomes that of a volunteer liable to be called up; it is analogous to that of a man liable to military service and not called up. This could not interfere with his civil occupations, and it would be absurd to hold that it did. The object of the provision was to protect officers and men actively engaged in warfare and to save them from civil worries. Therefore, a demobilized officer resumes his civil status as far as concerns the Acts, and is liable accordingly.

Leyman v. The King, 36 T. L. R. 835, raised the question whether a private soldier could sue the Crown for his pay. The facts were that an ex-corporal of the R. A. S. C. enlisted in Jersey, in September, 1914, on a special engagement at 6s. a day. On removal to Aldershot, he was again attested and given a pay-book, which stated his rate of pay to be 6s. a day. After twenty months he was informed that he was a time-serving soldier, with pay at the then ordinary rate of 1s. a day. He was compelled by his commanding officer to refund the difference which he had been receiving between 6s. and 1s. This amounted to £120, which seems later to have been refunded to him by way of bounty.

The corporal now prayed for payment at the original rate, from the time payment was reduced until his discharge, in 1919. The solicitor-general demurred to the petition, arguing that the relations between a soldier and the Crown were entirely at the pleasure of His Majesty, and not a matter of contract.

It was held that there was a species of contract between the soldier and the Crown, but it was of a kind which did not carry with it all those rights, to enforce by process of law obligations corresponding to those which the law attaches in the ordinary course to contracts between subject and subject.

In Rawlings v. General Trading Co., 37 T. L. R. 252, the plaintiff claimed an account of profits arising out of an agreement with the defendants at a public auction of government

stores that they would keep down the price by not bidding against each other and that they would share the profits of purchases made in this way.

The Court of Appeal (Scrutton, L. J., dissenting) allowed an appeal from the decision of Shearman, J., who had held that the agreement was unlawful as contrary to public policy. This defense was not raised upon the pleadings.

Atkin, L. J., held that this agreement could be unlawful as in restraint of trade only if it were unreasonable from the point of view of the public. As this point had not been raised upon the pleadings, and as no evidence to that effect had been brought, the Court could only hold the contract unlawful if it appeared *ex facie* to be unreasonable; the Court were not entitled to make the inference from the terms of this contract.

Scrutton, L. J., dissented on the ground that the contract was unreasonable from the point of view of the public, since by such contracts they were deprived of the advantage of free competition at auctions. Moreover, the goods sold in this case were the property of the community. Through the illegality of the contract had not been pleaded, he considered that all material facts were before the Court.

It is difficult to see the force of the argument that the agreement was contrary to public policy by reason of the fact that the goods for sale were the property of the state. For it could hardly be in accordance with public policy that "knock-outs" should be illegal at auctions of government stores, though legal at auctions of private property. The real question at issue would seem to be whether "knock-outs" are legal under any circumstances.

The decision of the Court is a further illustration of the reluctance of the Courts in modern times to decide cases according to the judges' views of public policy, which can be dealt with by legislation. On this point, see the judgments of Gorell Barnes, P., in Hyams v. Stuart-King (1908), 2 K. B. 696, and of Jessel, M. R., in Printing and Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462.

In Marriott v. Maltby Main Colliery Co., 37 T. L. R. 123, the Court of Appeal upheld the decision of the County Court judge that the dependents of a workman, who committed suicide owing to abnormal state of mind caused by an accident in the course of his work, could recover compensation. The suicide must be the result of the accident, not of brooding over the injury received. It is not necessary, however, to prove that insanity is due to "structural" injury to the brain; insanity can be the result of the accident if the shock affects the mental condition.

In this case the suicide was due to melancholia, culminating in insanity; and there was evidence that the melancholia arose through mental shock caused by the accident and through the pain suffered, not merely through the man's brooding over the accident or its results. The suicide was therefore the result of an accident in the course of the man's employment.

How far is drunkenness a defense to murder was the question decided in Director of Public Prosecutions v. Beard, 1920, A. C. 479. The prisoner, while intoxicated, committed rape upon a young girl, and in aid of the rape pressed on her throat, with the result that the girl died of suffocation. He was convicted of murder. The Court of Criminal Appeal substituted a verdict of manslaughter, on the ground that the question whether prisoner knew that his act which caused death was dangerous should have been put to a jury. The House of Lords restored the verdict of murder.

With regard to drunkenness as a defense to a criminal charge, the House of Lords expressly decided:

(1) That insanity produced by drunkenness is a good defense, similar, as to proof and effect, to insanity produced by other causes. The insanity may be temporary.

(2) That evidence of drunkenness which renders accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration in order to determine whether or not he had this intent.

(3) That evidence of drunkenness merely establishing that the mind is so affected that restraint and willpower are lessened is no defense, nor does it rebut the presumption that the natural consequences of acts are intended.

In addition it was stated *obiter:*

(4) That drunkenness rendered accused incapable of having intent to do the act, *i. e.*, not merely the specific intent requisite for the crime, but the original intent to act—is a defense.

For a full appreciation of the rule laid down in Ipswich Permanent Money Club, Ltd. v. Arthy, 1920, 2 Ch. 257, a somewhat full statement of the facts is necessary. W. S., the sole trustee and part beneficiary of a trust of real property subject to a trust for sale, mortgaged his reversionary interest in 1903 to A., and in 1907 to plaintiffs, without disclosing the previous mortgage to A. The reversionary interest was not sufficient to pay both. The fraud

was discovered in July, 1908, and negotiations ensued between plaintiffs an H. S., the brother of the trustee, who, in September, 1908, procured himself to be appointed a new trustee of the trust estate in order to deal with the situation. No agreement could be arranged; so in October, 1908, H. S. gave notice to both mortgagees of his appointment as trustee, and waited for the reversionary interest to fall into possession. Plaintiffs immediately gave formal notice of their mortgage. Notice of A's charge was given in 1911, when it was assigned to T.

The reversionary interest fell into possession in 1916, and plaintiffs claimed priority on the ground of their prior notice to H. S. in 1908, after his appointment as trustee.

Plaintiffs contended that after an independent person got the legal control of the property, they gave prior notice, by their formal notice in October, 1908, to H. S., after knowledge of his appointment as trustee. Relying on In re Dallas (1904), 2 Ch. 385, they contended that no notice to a person who may become a trustee is effectual; notice must be given after his actual appointment; therefore, at the crucial date, September, 1908, H. S. had no effective knowledge of A's mortgage, and the plaintiffs gave first notice. The defendant argued that knowledge is higher than notice, and as upon his appointment H. S. knew A's mortgage, this knowledge continued to operate on his mind and, as a reasonable man, he acted upon it.

Held, that it is well established that the rule does not render it necessary for an incumbrancer to prove that he gave notice of his charge to the trustee of the fund. It is sufficient to prove that the trustee had knowledge, upon which a reasonable man would direct his conduct accordingly.

Applying the principle of Lord Cairns' judgment in Lloyd v. Banks (1868), L. R. 3 Ch. 488, the knowledge of A's mortgage which H. S. acquired before his appointment, and was such that it protected the priority of A's mortgage and prevented plaintiffs' notice from displacing the priority.

In re Dallas was distinguished, as in that case notice was given before the fund had actual existence and was merely an expectancy; therefore, the notice in that case was ineffectual. Here the fund was always in existence, and even after it came into legal possession there was no notice which would displace the actual priority.

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TRADITIONS THAT DISTINGUISH BARRISTER AND SOLICITOR OF ENGLISH COURTS.*

"The best prospect," said Disraeli, "that the law holds out to a man is sport and bad stories until he is fifty and then a peerage."

Two of these rewards are obviously beyond the present reach of the American lawyer, no matter on which side of fifty he may find himself. It must be admitted that there are other differences between the lawyers of England and ourselves hardly less definitive. Of these the most pronounced perhaps are those which spring from the methodical and, from the American point of view, the somewhat rigid organizations of the legal profession itself. In large part this organization is the result of slow moving historical causes, but it springs also from that innate love of established order and custom which is one of the strongest instincts of the English race. The rank and precedence which obtain are not based upon any innate sense of superiority or inferiority among men—indeed the underlying philosophy of the English state is as profoundly egalitarian in point of human rights as that of America—but there is a desire to know and a willingness to recognize the exact limit of the sphere to which one has been assigned by choice or fate that is not felt in a newer society.

Legal Precedence.—The table of legal precedence accordingly is quite definite. It begins at the apex with the Lord Chancellor as the highest legal dignitary of the Kingdom and descends by successive gradation as follows:

The Lords of Appeal.

The Lord Chief Justice of England.

The Master of the Rolls.

The Lord Justices of the Court of Appeal (according to the seniority of appointment) and President of the Probate, Divorce and Admiralty Division.

*Address delivered at the American Bar Association by the former Ambassador to the Court of St. James.

Judges of the High Court (according to seniority of appointment.)

The Judge of the Arches Court.

The Attorney General.

The Solicitor General.

The Judges of the County Courts.

King's Counsel and such as have patents of precedence.

The Recorder of London.

The Common Sergeant of London.

Doctors of Civil Law.

Doctor of Laws.

Barristers-at-Law.

Proctors.

Solicitors.

Among barristers again, there is not only the distinction which prevails between the mere utter barrister in his stuff gown and the King's Counsel in his glistening silk, but there is precedence based upon the date of one's call to the bar, which is not entirely devoid of consequence in professional life. No King's Counsel can hold a brief for the plaintiff on the hearing of a civil cause, in the High Court, Court of Appeal or House of Lords, without a Junior, and it is quite unusual that he should do so even when appearing for the defendant in a civil case or upon a criminal trial.

While among those of lesser rank, no barrister should accept a junior brief for a barrister junior to himself in point of call, and as the table shows any and every barrister outranks all his legal brethren of the lower branch. Indeed, some years ago a solicitor rather bitterly remarked that "a barrister is to a solicitor what a peer is to a law stationer." Among solicitors themselves a greater equality obtains; or perhaps it would be fairer to say that their struggle for existence is neither helped nor hampered by questions of relative rank.

Mere questions of precedence aside, however, the whole scheme of legal life in Great Britain is built upon the hard and fast division between the barrister on the one hand and the solicitor on the other. It is a distinction which tradition, custom and positive law combine to maintain inviolate and inviolable; and to say that it is analogous to the difference with which we are familiar between the "court lawyer" and the "office lawyer," tells but half the story. Pollock & Maitland assert that historically considered "these two branches have different roots; the attorney represents his client and appears in his client's place, while the counter speaks in behalf of a litigant who is present in court either in person or by attorney.

The separation thus begun between the two orders continues to this day and shows itself not only in function, but in education, in dress, in legal status, in relationship to clients, in compensation and not least of all, in eligibility for public office. Thus a barrister educated at one of the Inns of Court and admitted by its benchers to the bar enjoys in his wig and gown a singular immunity from legal restraint. He is not an officer of the court and the court neither admits him to practice nor has power to disbar him from his profession. He takes no oath of service, nor even of allegiance, for an alien may enjoy full professional status at the English bar. The functions which he is permitted to perform fall into three classes, i. e.—advising upon questions of law; drafting pleadings, conveyances and other documents; and acting as an advocate in the courts. So long as he is of the junior bar he may receive pupils in his chambers; but once made King's Counsel this and the labors of drafting are beneath his professional dignity. To him and to him alone are open all the judicial offices of the Kingdom as well as the great political posts of Lord Chancellor, Attorney General and Solicitor General.

How different the lot of the solicitor! The law, it is true, gives him a quasi monopoly of litigation by ordaining that no one but a properly enrolled solicitor or a litigant in his own person can "sue out any writ or process or commerce, carry on, solicit or defend any action, suit, or any other proceeding in any court in England, or act

as a solicitor in any cause, matter or suit, civil or criminal." But it accompanies this grant with a degree of statutory regulation and legal supervision to which perhaps no other profession is anywhere subject.

From professional birth to legal death, the solicitor moves in the shadow of the law he serves. As an officer of the court he must preface his admission by an oath of faithful service and preserves his status from year to year by taking out an annual certificate on which a tax is paid. The signature of the Master of the Rolls is necessary for his admission but the Law Society, which has the rolls in its keeping, may oust him from his calling for any act of professional misconduct or personal immorality. His fees are rigidly prescribed by none too generous statute and unless he has sheltered himself behind the advice of some presumptively omniscient barrister, damages may be recovered from him for any negligence. He must be a British subject; and while, as the present Prime Minister has brilliantly demonstrated, he may attain the highest political office in the state, yet among legal offices only the most petty are open to him, and his voice may be heard only in the Chancery Chambers, the Bankruptcy Court of First Instance, County Courts and minor tribunals.

The choice between the one life and the other is one that can not be made at convenience. It must be made at setting out, for there is no part of the road which the neophytes of the two professions travel together. For the intending barrister the initial step is enrollment at one of the Inns of Court. There is an old bit of doggerel for the guidance of the student which runs thus:

"The Inner for the rich man,
The Middle for the poor man,
Lincoln's for the gentleman,
And Gray's for the boor."

The necessity for rhyming some word with poor is the only reason apparent for this libel upon Gray's Inn.

Lincoln's Inn Popular.—If a student contemplates practice at the Chancery Bar, he will follow custom and attach himself to Lincoln's Inn, which no doubt traces its traditional preference for Chancery to the days when the courts of the Vice Chancellor were located on the ground which it now occupies. The Inner and the Middle Temple are more especially the Inns of the common law barrister. The Middle is by tradition the most catholic and democratic of all the Inns, while the Inner, larger at present in point of numbers, is recruited largely from the Universities of Oxford and Cambridge, and it is supposed to entertain certain aristocratic leanings. Gray's Inn, the smallest of the four in point of numbers, makes no choice between the Chancery and the common law bars. It possesses, however, a mellowness and charm of its own, and claims as its patron saints Queen Elizabeth, Lord Bacon and Lord Chief Justice Coke, When an incendiary bomb from a German airplane pierced its roof, it narrowly escaped the Crown of Martyrdom.

The Students Duties.—To discuss in detail the preparation necessary for admission to the bar would be beyond the scope of this address. It is enough to say that the student must address himself to a double duty; first, keeping terms, and second, passing examinations. The so-called dining terms of the Inns are four in each year lasting three weeks each. Twelve terms or three full years, in the absence of some special dispensation, must be kept by dining in hall. Three days in each term is sufficient for those who are students in some university, six days for those less fortunate; and in order no doubt that the student may improve in morals as well as in mind, no attendance is counted in his favor unless he be present at grace both before and after meals. The examinations which precede his call are prescribed in behalf of the four Inns by the Council on Legal Education upon which all the Inns are represented. A course of preparatory lectures is arranged by the Council, which the student is at liberty to attend or ignore;

but whatever method of instruction he may choose, he must absorb sufficient information to pass the required examinations and must digest the quantity of food to which his dining terms constrict him.

Except for the necessity of examination there is little that is similar in the making of a solicitor. Straight is the gate and narrow is the way which he must travel on his professional way. The steps are four in number: First, he must serve as a clerk for three years under a practicing solicitor; second, he must pass the required examinations, conceded to be even more exacting than those demanded from the barrister; third, he must be duly admitted and enrolled; last, he must take out a proper certificate to practice. By the articles of clerkship he binds himself to the service of a practicing solicitor, paying him an agreed premium for his tutelage. In one such contract I recall the amount to have been 250 pounds, the addition of a stamp duty of 80 pounds to be affixed under penalty. The articles when executed must be enrolled and registered at the offices of the Law Society. How rigidly they bind the novitiate appears from the fact that before he enters upon any duty or engages in any employment whatever other than that stipulated in the articles, whether in or out of office hours, he must obtain his principal's consent and the sanction of the Judge. Even though the employment in no way interferes with his service under the articles there is no relaxation of the rules, and the penalty is the loss of credit for so much of his five years' term as had elapsed before the offense.

Thus the barrister and solicitor having entered their callings by different doors, pursue their separate lives to the end. They are not even welcome guests in each other's houses. No barrister can invite a solicitor to sit at table with him in the Inns of Court; and while the barrister may visit the sumptuous and comfortable quarters of the Law Society in Chancery Lane, where solicitors congregate, his frequent coming would lay him open to the suspicion that he was in search of business. One of the reproaches lodged against the notorious Jeffreys is that he came into full practice by getting acquaintance with the attorneys in the city and "drinking desperately with them." Apparently it is not his habits, but his associations which history condemns.

After this discussion of the ranks and orders into which the legal profession in England is divided, it may seem paradoxical to say that another point of contrast with the profession in America is the greater unity that prevails in England. In comparison with the close-knit organizations sheltered by the Inns of Court and the Law Society, we in America seem as so many scattered English grains of sand. It is difficult to make one familiar only with English atmosphere understand that in truth, notwithstanding this Association, there is no such body as the American Bar. There are instead, scattered groups consisting of county, city and state bars, with a Federal Bar here and there composed in part of the same members, but united by no tie of common origin or discipline.

In England, on the other hand, especially among barristers, there is a sense of solidarity and community of interest to which we do not attain. The companionship of the Inns permeates their entire professional life, and in the days gone by there was added to this the fraternity of the old circuit messes that made their semi-annual rounds of the assize towns. These pilgrimages Dean Swift has satirized in his jingling verses:

> "Now the active young attorneys
> Briskly travel on their journeys,
> Looking big as any giants
> On the horses of their clients."

and so on and so on for a hundred lines or more.

Figures are often misleading and generalizations from incomplete statistics are always dangerous; and yet I believe it may be truly said that the average Englishman withall of his proverbial insistence upon his personal rights calls less often upon his courts for relief than does his American

cousin. Who shall come forward with an explanation of this fact if fact it be? Is it a survival of days long gone when justice was not only costly but tardy and uncertain; is it because there exists in England a class of lawyers whose business lies wholly outside the courts and in whose hands many controversies are settled without judicial aid; or is there a reason deeper still in the age-long habit of this island people to respect the law they have made and live their daily lives within its well-marked circle?

Latest although not least of the portents of change are those due to the Act for the Removal of Sex Disqualification, passed in 1919, which has ushered in, not without much wagging of heads, the woman barrister, the woman solicitor and the woman jury member. When mixed juries made their first appearance there was much discussion among the judges and lawyers of the proper method of address, since the time honored "Gentlemen of the jury" was manifestly obsolete. The difficulty finally resolved by the adoption of the somewhat obvious phrase "Member of the jury."

And yet even in courts so modern and so new as the Court of Criminal Appeal, antiquity still rears its hoary head and will not be denied. I recall one case, in which our distinguished guest, (Sir John Simon), was a participant, where the court was called upon to determine the jurisdiction over a charge of perjury of the Justices of the Peace for the liberty of Peterborough, which involved a discussion of English history and of royal charters running back to ecclesiastical grants from Edgar the Saxon and Wolfrane the Elder. What an example such a case affords of the blending of the old and new which is at once the charm and strength of England and of English law? Is not the crown of the political genius of the Anglo-Saxon his ability to make great changes, both in law and government, without resort to violence? His movement may be slow, at times so deliberate as to be imperceptible, but none the less he moves. The radical of today is the conservative of tomorrow; the rearguard camps at night by the smoking watch fires from which the vanguard departed in the morning; but without breaking ranks or losing touch the whole column moves steadily onward to a broadening future.

When all comparisons have been made, and all differences recounted, the fact remains that the members of the legal profession in England are in very truth our brethren over seas. The common law by which we live has its roots in English soil. The judges who interpret it on both sides of the water look to their distant colleagues for counsel and assistance, and the principles of liberty which it embodies are the rod and staff by which our peoples walk. Trained in the same school, professing the same great ideals, sharers of like immunities and privileges, there rests upon the legal profession in England and America a duty which is joint and not several, complete and not divisible. The nations whom they serve stand today supreme in present strength and truth and in potential energy. Upon them destiny has laid accordingly the largest responsibility for the immediate future of the world. Shall not the lawyers who lead as well as serve them, guide them in the ways of mutual confidence and joint endeavor in the service of mankind?

JOHN W. DAVIS.

New York, N. Y.

NEGLIGENCE—IMPUTED.

COUNTY COM'RS OF DORCHESTER COUNTY v. WRIGHT.

Court of Appeals of Maryland. June 27, 1921.

114 Atl. 573.

Where an employee was, of his own choice and at his own cost, driving his automobile to the place where work was to be performed, his negligence was not imputable to his employer, riding in the back seat of the automobile, and not directing or controlling its operation.

URNER, J. The appellee was one of the occupants of a Ford automobile, which fell through an open draw in a bridge maintained

by the appellants over Cambridge creek in the city of Cambridge. For his personal injuries, thus occasioned, he recovered the judgment which is the basis of this appeal. The only bill of exceptions in the record is concerned with the rulings on the prayers.

The accident occurred at night. It was testified by the appellee, who occupied a rear seat in the automobile, and by George Ricketts, the owner of the car, who was driving it at the time, that there were no lights then observable anywhere on the bridge, and no warnings of any kind were given as to the condition of the draw, and that they did not see the opening into which they fell. According to the testimony offered by the appellants the approaches to the draw were brightly illuminated by two electric arc lamps when the accident happened, and there were red signal lights displayed on the drawbridge, indicating that it was open for the passage of vessels. In view of the conflict of the evidence as to whether the lights required for the protection of travelers on the bridge were in fact extinguished as the draw was being operated on the occasion referred to, the question of primary negligence could not properly have been withdrawn from the jury.

The most important question in the case is whether a verdict should have been directed for the appellants on the ground of contributory negligence. If the appellee had been in the position of the driver of the automobile, it would seem clear that his own negligence had contributed to his misfortune. The car was driven forward on the bridge, at accelerating speed, in spite of the fact, to which Ricketts, the driver, testified, that no signal lights were visible showing whether the draw was open or closed. The occupants of the automobile were familiar with the bridge and the system of lights by which the condition of the draw was intended to be revealed. If the draw was open, red lights were displayed to travelers on the bridge, and, if it was closed, the lights appeared green. As the automobile approached the draw it was moving, as Ricketts testified, at the rate of 4 or 5 miles an hour, and he had begun to increase its speed just before the car plunged into the creek. The headlights of the automobile should have enabled the driver to see some distance in advance, and if he had been as watchful and careful as the conditions demanded, he ought to have seen the draw open and stopped his car in time to avoid the accident. It was certainly not an act of ordinary prudence to proceed merely on the assumption that the draw was closed, if the customary signal lights were not there to assure him that the way was safe. But the lights were in elevated positions, 20 and 30 feet above the floor of the bridge, and the appellee was on the rear seat of the car, where his view was restricted by the top and curtains. Whether, being thus situated, his failure to anticipate the accident, and intervene to prevent it, was contributory negligence as a matter of law, is the question to be determined.

The negligence of the driver was not imputable to the appellee, as the former was operating the car as its owner, and not as the appellee's agent or employee. For some days preceding the accident Ricketts had been employed by the appellee in the work of gathering holly. They both lived near Federalsburg, and prior to the day of the accident the appellee had used his own car in taking Ricketts and others to the place where the holly was being gathered. On that day the appellee's car was not in a condition to be driven and Ricketts used his car in order that he might be able to return home at night. He was paid nothing for the use of the car; his only compensation being for his day's labor. There is nothing in the testimony to show that the appellee was traveling in the car in any capacity that gave him the right to direct or control its operation. The proof indicates that he was accompanying the owner as a guest. The case is therefore within the rule, which his court has repeatedly applied, that—

"The contributory negligence of a carrier, or of the driver of a public or private vehicle, not owned or controlled by the passenger, and who is himself without fault, will not constitute a bar to the right of the passenger to recover for injuries received." P., W. & B. R. R. Co. v. Hogeland, 66 Md. 163, 7 Atl. 108, 59 Am. Rep. 159; B. & O. R. R. Co. v. State, 79 Md. 343, 29 Atl. 518, 47 Am. St. Rep. 415; United Rys. Co. v. Biedler, 98 Md. 574, 56 Atl. 813; United Rys. & Elec. Co. v. Crain, 123 Md. 332, 91 Atl. 405; B. & O. R. R. Co. v. McCabe, 133 Md. 219, 104 Atl. 465; W., B. & A. R. Co. v. State, use of Hall, 136 Md. 109, 111 Atl. 164; McAdoo v. State, use of Kuntzman, 136 Md. 452, 111 Atl. 476; Chiswell v. Nichols, 137 Md. —, 112 Atl. 363.

But independently of the question as to the driver's failure to exercise due care is the issue as to whether the appellee was also negligent in not observing the danger and endeavoring to avoid injury by timely advice and warning to the driver. It was his individual duty to use ordinary care for his safety, and, if he failed in the performance of that duty, he cannot recover for an injury to which his own negligence thus contributed. This principle is fully supported by the decisions above noted. Whether the passenger has exercised reasonable care under the circumstances is usually

a question for the jury to decide. Chiswell v. Nichols, B. & O. R. R. Co. v. State, use of Hall, and B. & O. R. R. Co. v. McCabe, supra.

Judgment affirmed, with costs.

NOTE—*Negligence of Driver as Imputable to Guest or Passenger.*—By the great weight of authority any negligence of the driver of a vehicle is not imputable to a guest or passenger, whether gratuitous or for hire, where such guest or passenger has no right of control over the driver and does not attempt to exercise control over him. In Michigan a distinction is made between passengers in common carriers and persons who are riding gratuitously in private vehicles. The negligence of the driver is not imputable to the former, while it is to the latter. This same distinction was made for many years in Wisconsin, but in the recent case of Reiter v. Grover, Wis., 181 N. W. 739, that state aligned herself with the weight of authority as above stated. However, the negligence of an adult driver is held in Michigan not to be imputable to a minor passenger who has no control over the operation of the vehicle. Ommen v. Grand Trunk W. R., 204 Mich. 392, 169 N. W. 914.

The rule that the negligence of the driver of a vehicle is not imputable to an occupant riding with him applies as between husband and wife and the various other members of a family.

The above rule, however, has no application where the occupant has the right of control over the driver, or where the driver and occupant are engaged in a common enterprise, and it has nothing to do with the care required of an occupant for his own safety. Berry, Automobiles (3rd Ed.), Sec. 500 et seq, where this whole subject is fully covered and numerous authorities cited.

ITEMS OF PROFESSIONAL INTEREST.

DECLARATORY ORDERS IN THE COMMERCIAL COURT.

A singular difference of opinion was manifested in the House of Lords as to the powers of the Commercial Court to make a declaratory order in Russian Commercial and Industrial Bank v. British Bank for Foreign Trade, Ltd. (ante, p. 733). The question arose in this way. A Russian bank, whose head office was in Petrograd, but which had a London branch, advanced in June, 1914—just before war broke out—to an English bank the sum of £77,000. This sum was secured by the deposit of certain foreign bonds with the Russian bank. The loan was effected in Petrograd, not then so renamed, and the securities were deposited there. The agreement was evidenced by two letters which provided that the loan should be in roubles, unless sterling could be obtained by the Russian bank's London branch. The agreement did not specify in which currency, sterling or roubles, the loan was to be repayable; in 1914, when rates of exchange varied round the par of exchange in all directions in every few months, that question had not the importance which later events have given it. In 1919 the English bank sued the Russian bank in the King's Bench Division asking (inter alia) for a declaration that they were entitled to redeem the bonds on payment to the Russian bank, at their London branch, of 750,000 roubles or the equivalent in British currency. This assumed that the loan is repayable in roubles at their pre-war par of exchange. The Commercial Court held that the loan was a loan in sterling, but the Court of Appeal held that it was a rouble loan, and the House of Lords adopted their view. Both Court of Appeal and House of Lords, however, considered that the Commercial Court had no jusisdiction to grant relief by way of redemption, that being a matter reserved exclusively for the Chancery Division by the Judicature Act. The Commercial Court could only grant a declaratory order, without further relief. The result is interesting, for it implies that the Commercial Court, even when it has no jurisdiction to grant any form of relief, as in an action for the redemption of a martgage, can nevertheless make a declaratory order which is res judicata as regards the legal rights of the parties, and therefore binding on all other courts.

It is notorious, of course, that the jurisdiction to grant relief by way of declaratory order under the provisions of Order 25 has been extended of recent years to lengths that would have seemed almost a sacrilege some thirty years ago. Nowadays, declaratory orders are freely granted both in the King's Bench and in the Chancery Divisions when no other relief asked for, and even when no actual breach of contract or other incident creating an actual right of action has yet arisen. But a reaction has been manifesting itself of late against this tendency. In re Staples (1916, 1 Ch. 322) the Court of Appeal said that the jurisdiction under Order 25 should be exercised "sparingly," and in Markwald v. Attorney-General (1920 1 Ch. 348, at p. 357) Lord Sterndale said that there had been "too great a tendency of recent years to grant declarations." The present case certainly carries the jurisdiction to its extreme limits. In the first place, The English courts had very doubtful jurisdiction to try any action between the parties, as the contract was a Russian contract, made in Russia, for a loan to be repaid in Russia. Mr. Justice Roche, who tried the action in the Commercial Court, felt this difficulty, but as both parties had a

business domicile within the jurisdiction, and as decisions on questions of this kind could not in practice, be obtained just now in Russia, he decided to assist the parties by deciding the point. The second difficulty is that the Commercial Court had no possible jurisdiction, even were the cause cognizable by an English court, to hear and determine a claim by a mortgagee to redeem his mortgage; this is a matter, we need hardly say, reserved for the exclusive jurisdiction of the Chancery Division and ultra vires of every other division. Hence the Commercial Court actually made a declaratory order as to the rights of the parties in a matter over which it had no jurisdiction whatever. In these circumstances, it is not surprising that Lord Finlay and Lord Wrenbury, who may be regarded as two of the most conservative-minded of our law lords, refused to admit that the Commercial Court could even entertain the action. Lord Dunedin, Lord Sumner, and Lord Parmoor took the opposite view, and held that, as a matter of convenience, the declaratory order was justified. There is certainly weighty authority either way.—*Solicitor's Journal* (*London.*)

OWNERSHIP OF BURIED TREASURE.

We read occasionally of some lucky plowman, delver or explorer who unearths property long ago hidden by an owner who is probably dead, and who left behind him no traces of his identity. In this class of cases interesting questions of ownership have arisen.

In Ferguson v. Ray, 44 Or. 557, 102 Am. St. Rep. 648, 77 Pac. 600, 1 Ann. Cas. 1, 1 L. R. A. (N. S.) 477, it was held that gold-bearing quartz buried near a marked tree in a bag that had almost entirely rotted away is not to be regarded as lost property or treasure-trove, so that the title will vest in the finder as against the owner of the soil, although the length of time since it was hidden would indicate that the owner is dead or has forgotten it. But in Danielson v. Roberts, 44 Or. 108, 102 Am. St. Rep. 627, 74 Pac. 913, 65 L. R. A. 526, it was held that trover would lie on behalf of an employee who finds upon the employer's premises a large sum in gold coin contained in a rust-eaten tin can, which had evidently been hidden and forgotten by an unknown owner, where the employer took the money out of the employee's possession and refused to restore it to him. In the subsequent case of Roberson v. Ellis, 58 Or. 219, 114 Pac. 100, 35 L. R. A. (N. S.) 979, these apparently conflicting decisions are distinguished on the ground that the substance found in the Ferguson Case was gold-bearing quartz, which did not constitute gold or bullion within what the Court regarded as the proper definition of treasure-trove, whereas in the Danielson Case the substance found was gold coins, which, of course, came within such definition.

The conclusion reached in Ferguson v. Ray, supra, finds support in Burdick v. Chesebrough, 94 App. Div. 532, 88 N. Y. Supp. 13, where the rule is stated to be that if personal property is deposited beneath the surface of the soil, and so left until the place where it is so deposited is forgotten, and the owner thereof, if living, or his personal representatives, if he is dead, cannot be found, such personal property, so in the possession of the owner of the soil, becomes, as a part of the soil, the property of the owner of the real property; and such personal property passes by gift, sale, or descent of said real property as a part thereof. When it is discovered and removed from the soil, as against everyone but the owner, it becomes the personal property of the owner of such real property, and not the property of the finder thereof.

The rule established by the leading cases gathered in 17 R. C. L. 1200, 1201, however, declares that the title to treasure-trove, in the absence of legislation, belongs to the finder against all the world except the true owner, and that the owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership of the land. The law on the subject is thus stated at the place cited:

"Treasure-trove is any gold or silver in coin, plate, or bullion, found concealed in the earth, or in a house, or other private place, but not lying on the ground, the owner of the discovered treasure being unknown. Originally it belonged to the finder if the owner was not discovered, but afterwards it was judged expedient, for the purposes of state, and particularly for the coinage, that it should go to the King, whose right thereto depended on the same principles as the right to the goods of an intestate. In England, coroners are vested with a limited jurisdiction with regard to treasure-trove, confined to an inquiry as to who is the finder, and who is suspected thereof. This supervision by the state and right of the Crown created at common law a distinction between treasure-trove and lost property; but in this country the law relating to the former has been merged in that of the latter; at least, so far as respects the rights of the finder. It is not essential to its character as treasure-trove that the thing shall have

been hidden in the ground, for it is sufficient if it be found concealed in other articles, such as bureaus, safes, machinery, etc.; and while, strictly speaking, it is gold or silver, it has been held to include the paper representatives thereof, especially where found hidden with those precious metals; but to exclude gold-bearing quartz found buried in the earth, where it evidently had been placed some years before. It is essential to its character that it shall have been concealed by the owner for safe-keeping, and in this respect it differs from lost property and property voluntarily parted with. The rule in this country, in the absence of legislation, is that the title to treasure-trove belongs to the finder against all the world except the true owner, and in this respect it is analogous to lost property. Where the owner is unknown at the time of finding, and afterwards appears, the only effect is to destroy the character of such property as treasure-trove, and thus defeat the title of the sovereign or of the finder. Treating the property as treasure-trove does not render the finder liable for conversion, as his mistake, if such it may be called, like the refusal of the finder to deliver or demand lost property when the owner is unknown to him, is no conversion, for he is justified in his conduct at the time in treating it as treasure-trove by the presence of all the elements which constitute it such. The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership of the land; and so it has been held that workmen finding money which has been buried or secreted on the premises of their employer are entitled to its possession, and may maintain trover against the employer if he deprives them of the possession and refuses to restore it."

HUMOR OF THE LAW.

A certain physician is much peeved because of the lax enforcement of the prohibition laws. He said:

"Why, anyone can get liquor whenever he wants it."

And then, after a pause:

"I'd like to know where they get it. They don't come to me any more for prescriptions."

A rich Cuban needs an ear to replace one he lost in an accident and advertises for a new one to replace it, offering to pay handsomely for the accommodation. Needing the money and able to spare an ear, a citizen offers to provide it, but the law interposes and forbids it—says it will be mayhem and a jail offense. What a pity! We all know a lot of long-eared "peeping Toms" and "listening Susies" to whom the loss of one ear or both would be a public benefaction.—*Medical Pocket Quarterly.*

An attorney was recently trying to act as peacemaker between an indignant husband and a distrustful and jealous wife. He thought he was making some headway when the husband related an incident that he said was the last straw. He had hurried home to dress for a dinner, which he said was strictly a business affair, and: "What do you think she did? She had cut the seat out of the trousers of my dress suit!"

The attorney gave it up.

Even the Chief Justice of the U. S. Supreme Court can be humorous at times, lawyers attending the American Bar Association convention here learned at one of the sessions on legal education.

Spying William Howard Taft, chief justice, in the audience, Elihu Root, chairman of the session, asked the chief justice to occupy the platform with him.

"I think it is strong enough for both of us," said Root, former Secretary of State.

As he mounted the platform Taft remarked: "This is not the first platform I occupied with Mr. Root, and I can very distinctly recall that one platform was not as strong as we thought it was."—*Cincinnati Post.*

Of old, Pliny informs us, there was a belief in certain parts of Italy that if you wanted to ascertain the secrets of a woman, all you had to do was to place the wing of a chicken over her heart while she was asleep and you'd find them out. According to current newspaper reports, Dr. Edward Hiram Reede, neurologist of Washington, D. C., has a more accurate plan, premised on a more scientific foundation. It is this: first find out the politics of a woman's husband and then learn how his wife voted at the recent election. If hubby voted for Cox and wifie for Harding, it's a sign she doesn't love him—the secret is out. Inversely if they voted for the same candidate, all's well in Twelfth Street and the dove of domestic tranquility hangs over the door. Some of the ladies protest that this is no more infallible a sign than the chicken's wing, but I know a lot of folks who think it's dead right—probably they know.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Army and Navy**—Federal Relief Act.—The federal Soldiers' and Sailors' Civil Relief Act became the law of the individual states and of all the people of the United States under Const. art. 6, subd. 2, and thereby amended Code Civ. Proc. § 382, requiring actions on contract to be commenced within six years by excluding from the time of computation the period of military service so that the court could not acquire jurisdiction over a person in the military service by publication under Code Civ. Proc. § 438, subd. 6, authorizing such service, where the defendant was a resident, and the limitation would have expired within 60 days next preceding the application for publication, if the time had not been extended by the attempt to commence the action.—Erickson v. Macy, N. Y., 131 N. E. 744.

2. **Bankruptcy**—Attachment Lien.—Although a defendant receives a discharge in bankruptcy, which he sets up in a plea puis darrien continuance, the suit may still proceed to a qualified or special judgment, to permit plaintiff to enforce a lien by attachment against defendant's property or to bring suit against sureties on the bond given to release such attachment.—Star Braiding Co. v. Stienen Dyeing Co., R. I., 114 Atl. 129.

3.——Chattel Mortgage.—Under Code S. C. 1912, § 3542, as amended by Acts 1914, p. 482, providing that mortgages shall be valid, so as to affect the rights of subsequent creditors without notice from the time of their execution only when recorded within 10 days from time of execution, with a proviso that "the recording and record of the above mentioned deeds and instruments subsequent to the expiration of the said ten days shall, from the date of such record, have the same effect as to the rights of all creditors and purchasers without notice as if the said deed or instrument of writing had been executed and delivered on the date of the record thereof," a chattel mortgage executed by a bankrupt in good faith for a present valuable consideration and not voidable as a preference, recorded after the 10-day limit, but prior to bankruptcy, held valid as against all general creditors, including those who became such between the time of execution and recording of the mortgage.—In re F. H. Saunders & Co., U. S. D. C., 272 Fed. 1003.

4.——Jurisdiction of Court.—A court of bankruptcy can stay other suits only under the authority of Bankruptcy Act, § 11, or under the general rule that it may stay suits, even in state courts, which interfere with the administration of the estate in charge of the bankruptcy court.—In re Havens, U. S. C. C. A., 272 Fed. 975.

5.——Stay of Proceedings.—Where the bankruptcy court had granted leave for the institution of foreclosure suit after the election of the trustee, so that state court's jurisdiction over the parties had not attached before the property came into the possession of the bankruptcy court, and it appeared that there were sufficient assets to pay the mortgage sought to be foreclosed, as well as the two prior mortgages, but that the validity and amounts due on the three mortgages were disputed, and the same issue would be presented as to the prior mortgages as was involved in the mortgage on which foreclosure was begun, the further prosecution of the foreclosure proceedings will be stayed.—In re Locust Bldg. Co., U. S. D. C., 272 Fed. 988.

6.——Stockholders' Liability.—The question whether the liability of stockholders of a bankrupt corporation for the unpaid portion of the purchase price of the stock is an asset of the corporation or belongs to the creditors only depends on the laws of the state where the corporation was organized, and under the laws of Ohio as settled by the decision of its Supreme Court the liability belongs to the corporation, and may be enforced by the trustee in bankruptcy for the benefit of the general creditors, so that the bankruptcy court has jurisdiction generally, under Bankruptcy Act, § 27, to authorize a compromise of such liability.—Petition of Stuart, U. S. C. C. A., 272 Fed. 938.

7. **Banks and Banking**—Liability of Shareholder.—The presumption of liability on shares of stock is an insolvent bank, arising from the presence of a person's name on the stock register, is rebutted by evidence that a bona fide sale of the stock has been made, and that the vendor had performed every duty which the law imposed in order to secure the transfer on the registry of the bank.—State v. Ware, Okla., 198 Pac. 859.

8.——Title to Funds.—The chairman of a committee to arrange transportation for state delegates of certain war veterans to their national meeting had no title to funds collected by him from the delegates to cover their transportation and deposited by him in his personal checking account sufficient to subject such funds to garnishment or attachment against him.—Nathan v. O'Donnell, Cal., 198 Pac. 1028.

9. **Bills and Notes**—Indorsement "For Collection."—An indorsement of a note "for collection" gives the indorsee such a legal title as authorizes him to bring suit in his own name, providing that the title of the holder of a note cannot be inquired into unless necessary for defendant's protection, or to let in his defense, and section 4299, providing that an indorsement or assignment of a bill or note need not be proved, unless denied on oath.—Lightfoot v. Head & Cain, Ga., 107 S. E. 609.

10.——Interest.—It is a general rule that a promissory note, made payable without interest, bears interest at the legal rate after maturity; but, when the note is payable one day after date, interest is payable after demand for payment is made.—Watts v. Mayes, Mo., 232 S. W. 122.

11.——Memorandum.—In a suit on a promissory note by a holder claiming it by purchase from the payee or a former holder, and which contains neither a general nor special indorsement by which title would be transferred, if the only evidence of what occurred between the payee or the former holder and the claimant is a memorandum of payment on the back of the note, the transaction must be held to be a payment and discharge, and not a purchase of the note.—Purnell v. Gillespie, Miss., 88 So. 637.

12.——Purpose of Signature.—A signature placed upon the back of a promissory note will be presumed to have been placed there in response to an apparent call for it and as relevant to the purpose for which the note was executed, rather than for no purpose, or for a purpose which has already been accomplished.—Pineland Realty Co. v. Clements, La., 88 So. 818.

13. **Breach of Marriage Promise**—Loss of Benefits.—Plaintiff, suing for breach of marriage promise in addition to the loss of benefits which she would have enjoyed as wife of defendant, is entitled to recover her financial loss and for any humiliation and any impairment of health due to defendant's refusal to keep his promise to marry her.—Rubin v. Klemer, R. I., 114 Atl. 131.

14. **Carriers of Goods**—Rates.—In a carrier's action against consignor for balance due for freight on an interstate shipment, defended on the ground that the carrier had agreed to collect the freight from others, to whom consignor sold the cars while in transit, it was proper to instruct that the tariffs were fixed by the Interstate Commerce Commission, and if through a mistake a lesser rate was collected the difference between such rate and the regular rate is still due and collectible from consignor.—Chicago & E. R. Co. v. Lightfoot, Mo., 232 S. W. 176.

15. **Commerce**—"Foreign."—Carloads of beef in course of transit from Buffalo to Montreal and thence to England, when passing over a terminal road and switching yard jointly operated by defendant railroads where the engine was derailed and plaintiff's intestate, a conductor in the service of one of the railroads, killed, held a shipment in foreign commerce, though covered by an interline switching waybill which was superseded by bills of lading issued by a third railroad when it received the shipment; the character of the shipment being determinable by continuity of movement combined with unity of plan.—Cott v. Erie R. Co., N. Y., 131 N. E. 737.

16.——Interstate.—Sale of motor trucks by order through agent of foreign corporation resident in state held interstate commerce.—City Sales Agency v. Smith, Miss., 88 So. 625.

17. **Contracts**—Building Repairs.—Agreement to make repairs on building in a "good and workmanlike manner" required contractor to do the work in the same manner that a person skilled in doing such work would do it, and in a manner generally considered skillful by those capable of judging such work in the community of the performance.—Burnett & Bean v. Miller, Ala., 88 So. 871.

18.——Divisible.—A contract for the sale of real estate containing combined store and dwelling house and for the fixtures and stock was divisible into three parts, or at least the agreement as to the stock was severable from the other two subject-matters.—Kahn v. Orenstein, Del., 114 Atl. 165.

19. **Damages**—Measure of.—When, in the spring of the year, a person purchases a silo to be erected on his farm for use that summer or fall, and the agents for the company manufacturing the silo contract to furnish the purchaser an ensilage cutter at a stipulated price per ton for cutting the silage, but fail upon demand to furnish such cutter, the measure of damages is the difference between the value of the material or silage, the cost of putting it in the silo, and what the ensilage would have been worth at the usual feeding time for such ensilage during the winter following.—Young v. Eaton, Okla., 198 Pac. 857.

20. **Deeds**—Consideration.—Where an aged woman was partially paralyzed, so as to require a great deal of care, and had been sent from one relative to another, a promise by grantees to give her care and support for her natural life is a sufficient consideration to sustain a deed to a small farm, valued at $1,500, though the grantees sustained a confidential relationship to her.—Atkins v. Foreaker, Del., 114 Atl. 173.

21. **Descent and Distribution**—Value of Advancements.—Property advanced should be valued as of the date at which the advancement was made, and when there is a parol gift of land, under which possession is taken, and a deed is executed at a later date, the advancement is to be treated as made, and accordingly valued, at the time of the parol gift.—Ingram v. Ingram, Va., 107 S. E. 653.

22. **Divorce** — Res Judicata. — The wife brought an action for divorce on the ground of cruel and inhuman treatment. The divorce was denied. After the lapse of a year since the wife left, the husband brought this action for divorce on the ground of desertion. She denied the desertion, and counterclaimed for support, alleging that the husband's mistreatment had compelled her to leave him. It is held, following Stocking v. Stocking, 76 Minn. 292, 79 N. W. 172, 668, that the first action is not res judicata of the issues raised by the answer in the second action.—Wulke v. Wulke, Minn., 183 N. W. 349.

23. **Food**—Deception.—Agricultural Law, § 41, providing that no person selling any oleaginous substance not made from pure milk or cream shall use terms indicative of the process in the dairy in making or preparing butter, does not apply to the use of the words, "Churned for Table Use" on the label of oleomargarine or nut margarine where there was no intent to deceive and, in connection with the other statements on the label, no possibility of deception, in view of section 40, permitting the sale of oleomargarine, and section 51, stating that the object of that article is to prevent deception.—People v. Peterson, N. Y., 131 N. E. 748.

24. **Fraud**—False Representations.—In a suit for deceit and false representation as to the terms of a lease of a building, the party deceived and ousted by the owner before the expiration of the term for which it was leased, the measure of damages is the difference in value of the lease at the time of the ejectment and the amount that would have been paid as rent for the remaining part of the term, such being the actual damages contemplated where the claim is only for general damages.—Stone v. Pounds, Miss., 88 So. 629.

25. **Highways**—Negligence.—A county was not liable for its negligence in construction and maintenance of a culvert on a county highway.—Renner v. Buchanan County, Iowa, 183 N. W. 320.

26. **Insurance**—Excess Premium.—Where a life insurance society discriminated against its policy holder, in violation of Insurance Law, § 89, by exacting a weekly premium of 50 cents, instead of the proper premium of 36 cents, so that there was in the hands of the society, or at least in those of its agent company, moneys properly belonging to insured, it is not beyond the power of the court to deem such moneys applied to payment of premium charges, in order to prevent a forfeiture.—Fogg v. Morris Plan Ins. Soc., N. Y., 188 N. Y. S. 867.

27.——Insanity.—A provision in an accident policy limiting recovery in case of suicide while insane is unenforceable, Rev. St. 1919, § 6150, applying, but the statute does not apply to case of suicide while sane; hence it was improper in an action on an accident policy, where it appeared that the insured took his own life, to direct a verdict for the beneficiary regardless of a provision limiting recovery in case of suicide whether sane or insane, but the question whether the insured was sane or insane at the time should have been submitted to the jury.—Trembley v. Fidelity & Casualty Co., Mo., 232 S. W. 179.

28.——Liability of Insurer.—If, following default in payment of premium, the insurer's agent accepted the premium conditionally until a health certificate upon which to base a reinstatement of the policy could be obtained in case insurer should demand it, and the insurer did demand certificate, and insured died before the policy was reinstated, there could be no recovery, but if the agent accepted the premium and informed insured that a health certificate would be unnecessary, the insurer would be estopped to deny its liability, though insurer had instructed agent to obtain a certificate; the agent's neglect to so do being the negligence of the insurer.—Hoyle v. Grange Life Assur. Ass'n, Mich., 183 N. W. 50.

29.——Sufficiency of Proof.—The rule that failure to make timely objection to the form or sufficiency of the notice or proof of loss amounts to a waiver of the requirements of the policy for such proof applies only where there has been some apparent attempt by insured to comply with the requirements as to the furnishing of such proof.—State Ins. Co. v. Lock, Iowa, 183 N. W. 311.

30. **Intoxicating Liquors**—License Fee.—A licensee to whom a liquor license is unlawfully issued by a city, cannot recover the license fee voluntarily paid, even though it was paid in

the belief that the license might lawfully issue.—Courtright v. City of Detroit, Mich., 183 N. W. 346.

31.——Use of Automobile.—Under Acts Ex. Sess. 1917, p. 16, § 20, an automobile alleged to have been employed in the illegal transportation of liquor is subject to condemnation on evidence that it contained intoxicating liquor a short time previous to the seizure and within the period of limitations, though there is no evidence that any intoxicants were in the automobile at the time it was seized.—Williams v. State, Ga., 107 S. E. 620.

32. **Master and Servant**—Arising Out of Employment.—Where the evidence showed that plaintiff's employment as fireman in a sawmill did not take him in the vicinity of the circular saw by which his hand was injured, that he was not performing services arising out of and incidental to his employment, and that the accident happened because of his neglect of his duties and his unnecessary exposure to a dangerous implement, he could not recover compensation under the Employers' Liability Act.—Pierre v. Barringer, La., 88 So. 691.

33.——Assault by Employee.—Where a former employee, who had returned to collect pay due her, was assaulted by another employee, designated as a floor lady, who had authority to hire or discharge employees, who kept their time and paid them off, the master is liable for the assault, which grew out of the demand for pay.—Birmingham Macaroni Co. v. Tadrick, Ala., 88 So. 858.

34.——Course of Employment.—Under Workmen's Compensation Act, § 2, cl. (d), providing for compensation for accidental injuries arising out of and in the course of the employment, an employee cannot recover for injuries by being struck by an automobile while riding his bicycle on his way home to lunch during the noon hour.—Taylor v. Binswanger & Co., Va., 107 S. E. 649.

35.——Dependent.—Whether a surviving father is entitled to compensation by reason of the death of his minor son as the result of an injury received while in the discharge of a function for which he was employed depends, in part, upon the interpretation to be placed upon the language of the statute, which reads "actually dependent on the deceased employee to any extent for support." That language is here interpreted to include the case of a surviving father whose earnings are insufficient to enable him to discharge the legal obligation of maintaining his wife and children.—Heinzelman v. Board of Com'rs. La., 88 So. 798.

36.——Hazardous Employment.—Band conductor held "employee" in "hazardous employment" within Compensation Law classification of employments having four "workmen" or "operatives."—Europe v. Addison Amusements, N. Y., 131 N. E. 750.

37.——"Independent Contractors."—Members of contracting firm, pumping sand from well, held "independent contractors," and not "employees," within Compensation Act.—Pryor v. Industrial Acc. Commission, Cal., 198 Pac. 1045.

38.——Injuries Occurring Without State.—The Workmen's Compensation Act is optional, and where the employer and employee, in a contract to be performed within and without the state, elect to become subject to the act, the relation under it is contractual, and an injury occurring outside the state while the employee is within the ambit of his employment is compensable, though the title restricts the right to compensation to cases provided for by the act and the act provides in sections 8 and 13 of part III for hearings of the committee of arbitration at the locality where the injury occurred and for presentation of copy of award to the circuit court of the county in which the accident occurred and for judgment without notice.—Crane v. Leonard, Crossette & Riley, Mich., 183 N. W. 204.

39.——Negligence.—Where the superintendent directed plaintiff, a structural iron worker, to hold in position a measuring board and a stick at one end of an I-beam, while another worker undertook to straighten a flange at the other end of the beam by striking it with a sledge hammer, the fact that an injury resulted when the latter missed the beam and struck the board cannot be deemed to show that the accident was the result of the negligence of a fellow servant, but the negligence must be deemed that of the superintendent.—Simick v. Stupp Bros. Bridge & Iron Co., Mo., 232 S. W. 241.

40. **Mines and Minerals**—Oil and Gas Lease.—Where the owner of land has incumbered it with a valid oil and gas lease, containing what is declared to be an absolute sale of the underlying oil and gas, he has nothing left to sell, so far as those minerals are concerned, save an interest contingent upon the failure of his lessee to exercise his rights and comply with his obligations; and one who buys the land, with actual as well as presumptive knowledge of such recorded lease, acquires no greater interest by his purchase, and can convey no more to one to whom he assumes to lease the land for oil and gas development.—Standard Oil Co. v. Webb, La., 88 So. 808.

41. **Municipal Corporations**—Bond Issue.—The limitation of 5 per cent. of assessed valuation for creating of indebtedness in any one year, or 8 per cent. at any one time, does not apply to a vote authorizing the issue of bonds, but to their actual issuance, and hence the fact that electors of the city of Monroe voted sums in excess of the power to borrow would not prevent the city officials from borrowing up to the percentage limit under City Charter, §§ 133, 297.—Kirby v. City of Monroe, Mich., 183 N. W. 216.

42.——Notice of Injury.—Under Gen. Laws 1909, c. 46, §15, requiring persons injured on a highway to give notice of the injury to the town or city, and providing that such notice shall be signed by the person injured, or some one in his behalf, a notice giving all the information contemplated by the statute, and purporting to be given by H. P., as next friend of E. P., and signed "H. P., as next friend of E. P., by his attorneys, S. & S.," was sufficient.—Pepper v. Lee, R. I., 114 Atl. 10.

43.——Pool Hall.—The qualifications of one who has obtained a license to conduct a pool and billiard hall from the county judge, has been determined, and the mayor and council of a city or town have no power to by ordinance prescribe additional qualifications.—Nicodemus v. State, Okla., 198 Pac. 847.

44.—Snow on Sidewalk.—Property owner's act in piling snow along sidewalk not artificial accumulation and storage, rendering walk dangerous from natural causes.—Arning v. Druding, N. J., 114 Atl. 158.

45. **Negligence**—Degree of Care.—Operators of scenic railways or rolly-coasters, such as are conducted in amusement parks, and take passengers thereon for hire, and being sources of peril by reason of their steep inclines, sharp curves, and great speed, owe to those who patronize them the duty to exercise the highest degree of care, skill, and diligence that it is reasonably possible to afford, keeping in mind the practical operation of the railway.—Sand Springs Park v. Schrader, Okla., 198 Pac. 983.

46. **Payment**—Acceptance of Check.—The acceptance of a check by agreement of the parties has the effect of extinguishing the debt for which it was given, even though payment of the check is stopped.—Cook & Bernheimer Co. v. Hagedorn, Ind., 131 N. E. 788.

47. **Railroads**—Fence Law.—Where a child strayed on a railroad track and was killed by a train, the fact that the railroad company had not fenced its road in accordance with Railroad Law, § 52, requiring fences to prevent live stock from going thereon, is no basis for a finding that the company was negligent; the statute not extending its protection to children.—Di Caprio v. New York Cent. R. Co., N. Y., 131 N. E. 746.

48.——Liability.—As to persons riding on the rear end of an engine's tender, contrary to rules, on the unauthorized invitation of a brakeman, the railroad was under no obligation, and was not liable for personal injuries to them, when the engine collided with cars, where the engineer did not know of their presence and could not have anticipated it, as the negligent failure of the brakeman who invited them to ride to inform the engineer of their presence could not be charged to the railroad.—Ellsmore v. Director General of Railroads, N. H., 114 Atl. 25.

49.——Liability for Fire.—A railroad will not be held liable for a fire loss upon a mere possibility that the fire, which started in a ginhouse 70 feet away from the track, might have been started by sparks from a locomotive which passed 20 or 30 minutes before the fire was discovered, while a moderate breeze was blowing from the track toward the house, where there is no direct evidence of the origin of the fire, and the railroad has proven affirmatively that the spark-arresting apparatus was efficient and that there was no negligence in the handling of the locomotive.—Laurel Hill Gin & Mfg. Co. v. Yazoo & M. V. R. Co., La., 88 So. 801.

50.——Punitive Damages.—Under the provisions of the Federal Control Act of August 29, 1916, and Act March 21, 1918, punitive damages may be recovered in a suit for personal injury where the same could be recovered before the federal control was assumed, the said acts providing that while under federal control the carriers shall be subject to all laws and liabilities as common carriers whether arising under state or federal laws, or at common law, except so far as may be inconsistent with the provisions of said act. In all other respects it was the intent of Congress to leave the laws of the states in full force.—Davis v. Elzey, Miss., 88 So. 630.

51. **Sales**—Credit investigation.—Where, after their traveling salesman took an order, plaintiffs at their home office advised defendants it would be necessary that they hold the order pending completion of credit investigation, and that as soon as they received the information they would advise defendants as to accepting the order, such letter constituted an acceptance on the sole condition that defendants' credit standing prove satisfactory, and, nothing unsatisfactory in such respect appearing, plaintiffs had no right or authority, 25 days thereafter, to change or alter the contract by notifying defendants as to acceptance and shipment of part of the goods and declining to ship the rest because withdrawn from sale during the credit investigation.—Gilmer Bros. Co., Inc. v. Wilder Mercantile Co., Ala., 88 So. 854.

52. **Specific Performance**—Remedy Discretionary.—The enforcement of an option agreement for sale of land rests in the sound discretion of the court, and permitting the plaintiff to show that the land in question was in the very heart of a district which the plaintiff was purchasing and developing was competent to show that money compensation for the breach was inadequate, and that the performance of the option was the only adequate relief, and to show a reason for the defendants' breach.—Watkins v. Minor, Mich., 183 N. W. 186.

53. **Taxation**—Liquors in Warehouses.—Under Const. § 181, authorizing the imposition of license, occupation, and excise taxes by general law, Acts 1920, c. 13, imposing a license tax per gallon on every person engaged in the business of manufacturing, owning, storing and removing distilled spirits from bonded warehouses, payable on such removal, is unconstitutional, being not an occupation or excise tax, but a tax on the act of removal from bonded warehouses for the purpose of making some one of the only uses of which the property is capable, and therefore a tax on the property itself.—Craig v. E. H. Taylor, Jr., & Sons, Ky., 232 S. W. 395.

54.——Public Charity.—Property in which a public charity has a remainder contingent on the life tenant, a girl 20 years old, leaving no issue, or any such issue dying before majority without surviving issue, is not exempt under Const. § 170 and Ky. St. § 4026, as property being used in or devoted exclusively to public charity.—Moorman's Ex'r and Trustee v. Board of Sup'rs, Ky., 232 S. W. 379.

55.——Void Statute.—Chapter 75, Laws 1908, providing that stocks of goods, wares, and merchandise offered for sale by any firm, person, or corporation commencing business after the 1st day of February of the current year shall be assessed for ad valorem taxes, on given basis of the tax for a whole year, fixing the dates and proportions at quarterly periods, is unconstitutional, because in conflict with section 112 of the state Constitution, providing that taxation shall be equal and uniform throughout the state, and shall be assessed under general laws and by uniform rules according to its true value; the general law fixing the 1st day of February in each year as the date for assessing and valuing other property for ad valorem taxation.—Reed Bros., Inc. v. Board of Sup'rs of Lee County, Miss., 88 So. 503.

56. **Telegraphs and Telephones**—Federal Control.—Although the joint resolution of Congress of July 16, 1918, empowered the President to take control of all telegraph systems, and the presidential proclamation authorized the Postmaster General to exercise such control through the existing personnel, an action on a cause arising during governmental control was properly brought against the telegraph company; the contract between the company and Postmaster General obligating the latter to save the company harmless from all judgments and decrees by reason of any cause of action arising out of federal control, for, in any event, the judgment should be paid by the Postmaster General.—Poston v. Western Union Telegraph Co., S. C., 107 S. E. 516.

57.——Negligence.—Negligence could not be predicated on the act of a telephone employee on a highway in throwing a glass insulator to another employee on a telephone pole, frightening a horse within a few feet of him, where nothing unusual in the manner of the throwing appears, and it does not appear that he knew the horse was so near, as the act was not such as would naturally be calculated to frighten a gentle horse.—United Telephone Co. v. Barva, Ind., 131 N. E. 794.

58. **Vendor and Purchaser**—Shortage in Acreage.—The buyer of land cannot recover for a shortage in acreage in the absence of fraud, unless he has taken a warranty as to the acreage.—Lantz v. Howell, N. C., 107 S. E. 437.

59. **Wills**—Forfeiture of Gift.—Where a testator gave the rents, issues, and profits of his property to his wife and son equally, and provided that if the wife predeceased the son the property should go to the son absolutely, the killing of the wife by the son was not within Code Supp. 1913, § 3386, providing that no person feloniously taking the life of another shall inherit from such person or take anything from him by devise or legacy.—In re Emerson's Estate, Iowa, 18 N. W. 327.

60.——Legacies.—Where legacies are given generally followed by a gift of the residue of the estate, real, personal and mixed, the legacies are charged upon the residuary real estate as well as the personal estate, where the latter at the date of the will is insufficient to pay the debts and legacies of the testator, and in such cases the real estate may be reached to pay the legacies, or so much thereof as the personal estate is insufficient to pay.—Walters v. Young, Del., 114 Atl. 164.

61.——Life Estate.—Devise to wife to "hold," "control," and "use," for her life gives only a life estate; and the implication by the gift of the remainder that the widow might consume or dispose of a part of the estate refers to the personal property susceptible to destruction by use.—Rice v. Fields, Ky., 232 S. W. 385.

62.——Remainder.—Remainder held not to vest upon renunciation by widow given a life estate so as to allow acceleration.—Rose v. Rose, Miss., 88 So. 513.

63.——Remainder.—Under a will devising to testatrix's grandsons and their survivor and the heirs of such survivor a certain farm on trust, that such trustees should allow granddaughters to have the use of certain cows, also to pay over to them the rents and profits of the farm during their joint natural lives, on death of either of such granddaughters, the portion of the one so dying to go to her representatives in fee simple equally, share and share alike, the trustees to pay over and transfer accordingly, the trustees had no duty to perform or discretion in reference to the remainders, and the representatives of the granddaughters took legal estates to which the rule in Shelley's Case did not apply.—Beggs v. Erb, Md., 113 Atl. 881.

64.——Revocation.—Forcibly preventing testator from changing will held not such a change in conditions or circumstances as to amount to a revocation by implication.—Minor v. Russell, Miss., 88 So. 633.